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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

No. 81 6598

WAYNE LADD KRIER, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE GEORGIA SUPREME COURT

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April 23, 1982

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TO THE GEORGIA SUPREME COURT

Petitioner, Wayne Ladd Krier, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Georgia Supreme Court entered in this proceeding on February 23, 1982.

OPINION BELOW

The opinion of the Georgia Supreme Court, Case No. 37809, reported at 249 Ga. 80, --S.E.2d--(1982), appears in Appendix A hereto.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on February 23, 1982, affirming Petitioner's conviction on the charge of murder and imposition of the sentence of death. Petitioner's conviction and sentence having thereby become final, as has the Opinion and Order of the Georgia Supreme Court, the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment XIV: "...nor shall any state deprive any person of life, liberty, or property, without due process of law,..."

Amendment V: "No person...shall be compelled in any criminal case to be a witness against himself..."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner was indicted by the September, 1979, Grand Jury of DeKalb County, Georgia, on the charge of murder.

Pretrial Motions were heard the week of February 11, 1980, before the Honorable R. Keegan Federal, Jr..

Trial of the case commenced on February 19, 1980, before the Honorable R. Keegan Federal, Jr., and a jury. On February 21, 1980, the jury returned a verdict of guilty to the charge of murder.

On February 22, 1980, after further evidence and deliberation, the jury returned a recommendation that the Petitioner be sentenced to death.

The date of execution was set for April 26, 1980.

Motion for New Trial was filed on March 20, 1980, and amended April 1, 1981.

Motion for New Trial was denied on May 12, 1981.

Notice of Appeal to the Georgia Supreme Court was filed on June 9, 1981.

The opinion and judgment of the Georgia Supreme Court affirming Petitioner's conviction and sentence of death was entered on February 23, 1982.

STATEMENT OF THE FACTS

In August, 1979, Petitioner, Wayne Ladd Krier, escaped from a penal institution in North Carolina where he had been serving a term for armed robbery. At the time of his escape, Krier had been in prison for approximately ten years and had been promoted to the position of Trustee. He made his way to Atlanta, and using the name of Nick Michael Cordoba, obtained a job at Guthrie's Carnivals. (T. 1127).

The victim, Teresa Lavin, a 22-year-old part-time student at Georgia State University, lived in the Chesterfield Apartments along with Ms. Bartlett Carpenter, Ms. Carpenter's son, Brad, and Mr. Mark Butcher.

Several days prior to her death, Ms. Lavin was babysitting for Brad Carpenter while Ms. Carpenter and Mr. Butcher were out of town. She took Brad and a friend of Brad's to the carnival. While at the carnival, Ms. Lavin came up to Mr. Krier where he was selling tickets for a ride. She asked him if he had any marijuana. He replied that he did not, but that he might be able to locate some at a later time. She then wrote her name and telephone number on a ticket and gave it to him. Mr. Krier called Ms. Lavin later that night to tell her that he had found some marijuana. She told him that there was a party going on at her apartment and that he should come over. Mr. Krier declined the invitation, so Ms. Lavin said that he should come over at 11 o'clock the next morning. When he arrived the next morning, she answered the door in a nightgown, and told him that she forgot he was coming over and to telephone her later because somebody else was there. Mr. Krier left to go back to work.

Several days later, Mr. Krier again called Ms. Lavin and she told him to come on over, that she was cleaning her apartment. Mr. Krier and another individual, Mr. Daniel Cody, went over to Ms. Lavin's apartment complex in a car which Krier had borrowed from a girlfriend. They checked in with the security guard, who took Mr. Krier's name and the license tag number off of the automobile. Mr. Krier and Mr. Cody were unable to find

Ms. Lavin's apartment, so they left, signing out with the security guard as they exited. Mr. Krier then went and got something to eat, after which he took two Quaalude tablets and two hits of LSD. He called Ms. Lavin on the telephone again and she told him that he had gone to the wrong apartment and that he should come over right then. Mr. Krier went back alone to Ms. Lavin's apartment. This time the security guard allowed him to go through the security gate, but did not sign him in or out. (T. 1012-1016).

When Mr. Krier got to Ms. Lavin's apartment, she was vacuuming. She let him in, and they smoked some marijuana. He then helped her clean her apartment for a while, and then they smoked some more marijuana. While they were smoking, Mr. Krier reached over and touched Ms. Lavin on her shoulder in order to get her attention. When he did this, she turned around and glared at him, and then began hitting him and screaming obscenities at him for no apparent reason. Mr. Krier then slapped her so hard that it spun her around and in response, she swung the vacuum cleaner tube at him. Mr. Krier then took out a knife, and in a drug-induced rage, slashed Ms. Lavin to death. He also hit Ms. Lavin with the telephone receiver hard enough to break the receiver. Mr. Krier then fled the apartment and drove back to the carnival, where he left his blood-stained pants and the knife in a carnival truck. He then drove to Birmingham where he sold the car for $95.00 and bought a bus ticket to New Orleans, where he staved for two days before being arrested. (T. 166, 182, 188, 1244).

A warrant for the arrest of the accused was obtained several days pryor to his arrest. (T. 56-57). Immediately after his arrest, Mr. Krier was advised, by the New Orleans police, of his Constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). It is unquestioned that immediately upon his arrest in New Orleans, Mr. Krier refused to waive the rights accorded him under Miranda v. Arizona, supra. This fact is made certain by Defense Exhibit No. 1 (T. 1603) and Defense Exhibit No. 2 (T. 1604). D-1 is a copy of the New Orleans Police Arrest Register; D-2 is a copy of the New Orleans Police General Case Report concerning Mr. Krier's

arrest. Both D-1 and D-2* contain explicit statements that Appellant was informed of his Miranda rights and that he refused to waive these rights.

During the pre-trial hearings, Mr. Krier testified that at the time of his arrest he specifically requested to talk to an attorney but that he never talked to one (T. 211, 215) except when he talked very briefly to a public defender about extradition. At this hearing, Mr. Krier was among about 20 prisoners with whom a single public defender briefly conversed. When this public defender learned that Mr. Krier intended to waive extradition, he ended the brief conversation and told Mr. Krier that he had nothing to do with the Georgia case. (T. 220). This conversation took place in open court shortly before Mr. Krier waived extradition back to Georgia. (T. 220). However, before Mr. Krier ever spoke with the public defender, the DeKalb County police approached Mr. Krier in jail in New Orleans and obtained a written waiver of his Miranda rights. (T. 200).

Also at the New Orleans extradition hearing, the DeKalb police were instructed by the Judge not to question Mr. Krier about the crime while on the way back to Atlanta. The DeKalb County investigator testified at trial that he knew he was not supposed to talk to Mr. Krier, "Because of the Miranda rights in here. He had the right to an attorney." (T. 203, 204). Upon his arrival in DeKalb County, however, Mr. Krier was interrogated by the DeKalb County police and gave a series of statements and confessions to the investigators, during which he admitted killing Ms. Lavin.

At trial, Mr. Krier's statements to the DeKalb County police were admitted into evidence, over his objection. Mr. Krier requested the Trial Judge to instruct the jury on the lesser included offense of voluntary manslaughter, but this request was refused by the Trial Judge. Mr. Krier was convicted of murder and sentenced to death. The Supreme Court of Georgia affirmed the conviction and the sentence of death.

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*D-1 and D-2 are attached hereto as Appendix B and C.

QUESTIONS PRESENTED

1. Whether, in a capital murder case, when the accused's life is at stake, where there is some, slight evidence negating malice and pointing to provocation of the accused by the deceased, the Trial Court can, consistent with due process, determine that the quantum of evidence presented by the accused was insufficient as a matter of law to warrant an instruction to the jury on the lesser-included offense of voluntary manslaughter?

2. Whether the Fifth, Sixth, and Fourteenth Amendments prohibit the police from further interrogating an accused who has unequivocally refused to waive his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966), unless the accused himself initiates further communication with the police?

3. Whether a sentence of death may be constitutionally imposed where the sentencing jury was permitted to consider evidence of the accused's prior convictions and sentence for armed robbery without any limiting instructions on its use and where the sole state statutory grounds for seeking the death penalty was that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"? Ga. Code Ann. §27-2534.1(b)(7)

REASONS FOR GRANTING THE WRIT

1. The Trial Court's failure to charge on the lesser included offense.

At the close of the guilt/innocence phase of his trial, the Petitioner, Wayne Krier, requested the Court to instruct the jury as to the lesser included offense of voluntary manslaughter, arguing that there was evidence that he had denied bearing any malice towards the victim, and that the fatal slashing was the result of provocation by the victim. (T. 1286). The evidence at the trial was clear in that Mr. Krier denied bearing any malice toward the victim and denied that he had gone to her apartment with any scheme or even any thought of harming her, much less killing her. (T. 1138-1197, 1230-1239). The evidence

as to provocation and an impassioned killing, however, was weaker. The entire evidence as to the issue of voluntary manslaughter was offered exclusively by Mr. Krier. Petitioner's pre-trial statements to the police repeatedly make the point that he reached over and touched Ms. Lavin on her shoulder and that she turned and glared at him with a look of contempt or disgust and then started hitting Mr. Krier for no apparent reason. (T. 166, 182, 188). Petitioner's pre-trial statements make the point that he then slapped Ms. Lavin with his open hand, hard enough to spin her around, but that she continued to rush at him and to hit him with her fists. (T. 166, 182, 1888). It was only after this altercation between Mr. Krier and Ms. Lavin that Mr. Krier pulled out the knife and slashed Ms. Lavin. During the sentencing phase of the trial, Mr. Krier told a slightly contradictory story, stating that it wasn't until after he slapped her with his open hand that she began to hit him with her fists and with the vacuum cleaner tube. (T. 1244).

The Georgia Supreme Court found that there was not sufficient provocation to warrant a charge on voluntary manslaughter. The Supreme Court did not say that there had been no provocation, only that there had been no serious provocation. This raises the question, whether the death penalty may be constitutionally imposed when the Trial Court has withdrawn from the jury's consideration the issue of a lesser included offense on the grounds that the quantum of evidence on the issue of provocation is insufficient, as a matter of law, to invoke the statute on involuntary manslaughter.

There is no question that manslaughter is a lesser included offense of the crime of murder. Stevenson v. United States, 162 U.S. 313 (1896). Therefore, the only consideration is of the evidentiary predicate necessary to support a request for a lesser included offense instruction. Ordinarily, a lesser-included offense instruction is only proper where there is "a disputed factual element", i.e., where "there are disputed issues of fact which would enable the jury rationally to find" that all elements of the lesser offenses have been proved. Sansone v. United States, 380 U.S. 343 (1965).

The Federal Circuit Courts of Appeals have interpreted Sansone to mean that "when the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser included offense, there is a duty on the defendant to come forward with some evidence on that issue if he wishes to have the benefit of a lesser included offense charge." Driscoll v. U.S., 356 F.2d 324, 327 (1st Cir. 1966). In order to refuse a lesser included offense instruction, two prerequisites seem to be vital: "That there be no factual dispute and that a finding contrary to the only evidence in the issue would be irrational." Driscoll v. U.S., supra at 327. See also, United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977); United States v. Madden, 525 F.2d 972 (5th Cir. 1976); United States v. Thompson, 490 F.2d 1218 (8th Cir. 1974); United States v. Harary, 457 F.2d 471 (2nd Cir. 1972); Government of Virgin Islands v. Carmona, 422 F.2d 95 (3rd Cir. 1970); United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970); Belton v. United States, 382 F.2d 150 (D.C. Cir. 1967); Larson v. United States, 296 F.2d 80 (10th Cir. 1961).

Most of the Federal Circuit Courts of Appeals have stated that they would allow an instruction on a lesser included offense only when there is enough evidence to provide a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser included offense. However, some courts have said that any evidence, however weak, is enough to justify an instruction on the lesser included offense and that in a close case the Trial Court should generally give an instruction if requested. United States v. Comer, 421 F.2d 1149, 1154 (D.C. Cir. 1970); see also, United States ex rel. Matthews v. Johnson, 503 F.2d 339 (3rd Cir. b974).

The quantum of evidence that state courts describe as necessary to justify a lesser included offense instruction varies from state to state. In Louisiana and Florida, the Trial Court must instruct on lesser included offenses even if there is no evidence tending to show the defendant guilty only of the lesser offsnse. See, State v. Madison, 319 So.2d 912 (La. 1975);

Brown v. State, 206 So.2d 377 (Fla. 1968). In Pennsylvania, in a murder trial, a defendant is entitled, upon request, to an instruction on a lesser included offense. United States ex rel. Matthews v. Johnson, 503 F.2d 339. 346 (3rd. 1974). California requires, upon request, an instruction on a lesser included offense, because the jury may wish to soften the "harsh application of the law". People v. Powell, 208 P.2d 974, 981 (1949). The majority of jurisdictions, however, allow lesser included offense instructions only when the evidence sustains a rational belief in the defendant's guilt of a lesser crime. See, Beck v. Alabama, 447 U.S. 625, 636 (1980), n. 12.

Georgia appears to follow the majority of states. In Georgia, in order to warrant a charge in voluntary manslaughter, the evidence must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980). If there is any evidence, however slight, as to whether an offense is murder or voluntary manslaughter, instructions as to the law of both offenses should be given to the jury. Swett v. State, 242 Ga. 228, 248 S.E. 2d 629 (1978). However, in Georgia, it is a question of law for the courts to determine whether there is slight evidence that the defendant acted as a result of sudden, violent and irresistible passion resulting from serious provocation. Swett, supra. In the case now before the Court, the Georgia Supreme Court decided as a matter of law that there had been "no serious provocation" sufficient to justify a charge on voluntary manslaughter.

In a case where the accused's life is at stake, it is constitutionally impremissible to allow the Trial Court to determine as a matter of law that the evidence negating the element of malice (i.e., the evidence bearing on the degree of provocation) is insufficient to require a charge on voluntary manslaughter. Proof of homicide necessarily involves proof of malice. Malice in connection with the crime of murder means the condition of a man's heart or mind at the time of the killing. Because no one can look into the heart or mind of another with any certainty, the only way to decide the issue is to infer it

from all of the facts or circumstances surrounding the killing. That inference is one of fact for a jury. Stevenson v. United States, 162 U.S. 313, 320 (1895). By refusing to charge on a lesser included offense of voluntary manslaughter, the trial court denied petitioner his right to have every issue fairly decided by a jury, beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The trial court may have believed that Mr. Krier's evidence was wholly incredible and inadequate as a matter of law and that it was clear that he was actuated by malice at the time of the killing. But as the United States Supreme Court held in Stevenson v. United States, 162 U.S. 313 (1895), "...if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all of the evidence what the condition of the mind was, and to say whether the crime was murder or manslaughter." Supra at 323.

It was assumed by this Court, when it upheld the constitutionality of the Georgia death penalty statute in Gregg v. Georgia, 428 U.S. 153 (1976) that the Trial Judge was required to charge lesser included offenses when they were "supported by any view of the evidence." Gregg, supra at 163. The Gregg opinion cites two Georgia cases in support of this proposition: Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948) and Linder v. State, 132 Ga. App. 624, 625, 208 S.E.2d 630, 631 (1974). Both Sims and Linder argue that it is for the jury to decide whether an offense is murder or manslaughter, Sims at 864, Linder at 631, even where the amount of provocation is not shown. Linder at 631. In part, this is because the jury can choose to believe or disbelieve any part of the accused's testimony, confessions or statements. Sims at 865. Clearly, in the constitutional scheme envisioned by this Court in Gregg, in a capital case, where the accused's life is at stake, due process requires that the accused be accorded the procedural safeguard of an instruction on a lesser included offense where there is any evidence, however weak or contradictory, on the lesser offense. This is particularly true where the evidence clearly establishes that the accused is guilty of a serious, violent offense but because of the accused's own testimony

leaves some doubt with respect to the issue of malice (an element that if not proved beyond a reasonable doubt would not justify conviction of a capital offense). Then, the failure to give the jury the option of convicting on a lesser included offense of voluntary manslaughter enhances the risk of conviction of the capital offense of murder. See, Beck v. Alabama, 447 U.S. 625 (1979); Keeble v. United States, 412 U.S. 205 (1972).

"Such a risk cannot be tolerated in a case where the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments...." Beck v. Alabama, 447 U.S. 625, 637 (1979); see, Gardener v. Florida, 430 U.S. 349 (1977). As this Court said in Beck v. Alabama, "...if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction," the State is constitutionally prohibited from withdrawing that option from the jury in a capital case. Beck, at 638.

Beck was scrutinizing a unique Alabama statute that prohibited the trial court from instructing the jury in a capital case as to a non-capital, lesser included offense. The Court held that that section of the statute was unconstitutional and violative of due process. While Georgia has no comparable statutory prohibition, the reasoning of Beck applies to this case. Where a defendant is on trial for his life on a charge of murder and there is some slight evidence tending to leave some doubt with respect to the element of malice, it violates due process under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution for the Trial Court fo fail to instruct the jury on a lesser included offense of voluntary manslaughter.

The danger in refusing the charge on voluntary manslaughter becomes obvious when one reads the Court's instructions to the jury on the issue of malice. The Trial Court instructed the jury during a homicide, "Malice shall then be implied, unless there is evidence showing considerable provocation for the commission of the act." (T. 1309-1310). But the Trial Court did not instruct the jury that if they found such provocation to exist that they

could then consider the offense of voluntary manslaughter. The jury was left with no option other than to acquit or convict, where it was obvious that Mr. Krier had caused the death of Ms. Lavin. This is precisely the situation condemned by the Supreme Court in Beck and Keeble.

This cause should be taken for review so that this Court can determine whether, in a capital case, where the accused's life is at stake, the trial court can constitutionally determine, consistent with the constitutional mandates of due process, that the quantum of evidence presented by the accused was insufficient as a matter of law to warrant a jury instruction on the lesser included offense of voluntary manslaughter.

2. The confession obtained after Petitioner refused to waive his rights under Miranda v. Arizona.

When Mr. Krier was arrested in New Orleans, he was advised of his Miranda rights and the police reports of the New Orleans Police Department clearly state that he refused to waive his Miranda rights (T. 1603, 1604). Mr. Krier testified during pretrial hearings that shortly after his arrest he specifically requested to talk to an attorney before answering questions (T. 211, 215). The New Orleans authorities did not continue questioning Mr. Krier. The day after Mr. Krier's arrest, Investigator Rowell of the DeKalb County, Georgia, Police Department reinformed Mr. Krier of his Miranda rights and secured a written waiver of these rights. (T. 135). The next morning Mr. Krier was taken before a judge for an extradition hearing. At this hearing, Mr. Krier was among about 20 prisoners with whom a single public defender briefly conversed. When this public defender learned that Krier intended to waive extradition, he ended the brief conversation and told Krier that he had nothing to do with the Georgia case. (T. 220). The Judge instructed Detective Rowell that he was not to question the defendant during the trip back to Georgia, and Detective Rowell testified at trial that he understood the Judge to mean that he could not talk with the defendant because of the defendant's Miranda rights and

specifically the fact that the defendant had the right to an attorney. (T. 203, 204). Upon their return to DeKalb County, Georgia, Detective Rowell readvised the Defendant of his Miranda rights and began a lengthy interrogation during which the defendant repeatedly incriminated himself. Nowhere in the record is it alleged that Mr. Krier ever initiated any communication, exchange or conversation with the police.

The decision of the Georgia Supreme Court applied to the above facts in this case conflicts with the decisions of this Court in Edwards v. Arizona, 451 U.S. 477 (1981) and Miranda v. Arizona, 384 U.S. 436 (1966). In Edwards v. Arizona, supra, this Court held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. This Court further held in Edwards that once an accused has expressed his desire for counsel, he is not subject to further interrogation by the police until counsel has been made available to him, unless the accused himself initiates further communication with the police. Edwards v. Arizona, supra at 1885-86.

The Georgia Supreme Court held that the ruling in Edwards, supra, did not apply in the instant case. They distinguished Edwards on three grounds. First, Georgia Supreme Court pointed out that "it is not undisputed that Appellant made a request for counsel while in custody of New Orleans authorities." (Appendix A, p. 2). Second, the Georgia Court went on to say that even assuming assertion of the Defendant's rights, further inquiry by the Georgia authorities was not prevented, where the Georgia authorities reasonably understood that no request for counsel had been made. Third, the Georgia Supreme Court held that there was no doubt that the defendant's confessions were obtained only after the "intentional relinquishment or abandonment of a known right or privilege."

Assuming for the purpose of argument that the Georgia Supreme Court is correct in stating that Mr. Krier did not properly assert his right to counsel, it is still unchallenged that Mr. Krier unequivocally refused to waive his Miranda rights immediately upon his arrest. (T. 1603, 1604, see Appendix B and C). Two important questions are raised by Mr. Krier's refusal to waive his Miranda rights:

(1) Whether a refusal to waive one's rights under Miranda is equivalent to an assertion of those rights?

(2) Whether the rule of Edwards should apply to a situation where one generally exercises his rights under Miranda (i.e., the right to remain silent) rather than makes a specific request for counsel?

The answer to both of these questions must be in the affirmative.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), makes it clear that if the individual indicates "in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Miranda, supra, at 473-474. (Emphasis Added). The "in any manner" language used by the Court in Miranda makes it clear that the refusal to relinquish one's Miranda rights is equivalent to an invocation of one's Fifth Amendment privilege.

In the case before this Court, the only conclusion is that Mr. Krier's refusal to waive his Miranda rights is an affirmative assertion of those rights and that any statement taken subsequently by the police is the product of coercion and therefore inadmissable at the trial of the case. This conclusion should be dispositive of the case except that the Georgia Supreme Court argued that Mr. Krier's behavior subsequent to his arrest amounts to a voluntary and knowing waiver of his Miranda rights.

However, as the Court in Edwards, supra, wrote, absent further interrogation "there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver." Edwards, supra at 1885. The rule announced in Edwards avoids the arduous decisions that must be made in determining whether or not a valid waiver has occurred. This brings us to the second question.

The rule in Edwards was limited to cases where the individual had clearly asserted his right to counsel under the Fifth Amendment and Miranda v. Arizona, supra. Miranda, however, is not primarily a right to counsel case but rather is focused on the Fifth Amendment right to remain silent. The right to counsel under Miranda is not the primary right being asserted, rather it is a protective right indispensable to the assertion of the individual's primary Fifth Amendment right to remain silent. That is why, under the scheme of Miranda, a person in custody who is to be subjected to interrogation must first be informed that he has the right to remain silent. Miranda, supra at 467-468. It is only after a person is told of his right to remain silent and that anything he says can and will be used against him that he must be informed of his right to counsel. Even though the assertion of the right of counsel is a significant event such that interrogation must cease until an attorney is present, it is still a subsidiary right supportive or protective of the greater Fifth Amendment right to remain silent.

Even within the Miranda opinion it is recognized that despite the critical aspect of the right to counsel, it is the right to remain silent that is the most important right being protected under the Fifth Amendment. For example, Miranda, supra, decrees that when an individual indicates in any manner at any time that he wishes to remain silent, the interrogation must cease. Miranda, supra at 473-474. Nowhere does Miranda indicate that questioning on the same subject matter can be resumed by the police. [However, Michigan v. Mosley, 423 U.S. 96

(1975), does permit the police to initiate further interrogation of an accused after he has asserted his right to remain silent, but only about crimes other than the one the accused desired to remain silent about.] This is because the right to remain silent is an absolute right to cut off questioning which must be scrupulously honored by the police. However, with respect to an individual's assertion of his right of counsel, Miranda holds that the interrogation must cease only until an attorney is present, thereby providing the police with a means of continuing the interrogation. Miranda, supra at 474.

Accordingly, where additional safeguards are necessary when the accused asserts his subsidiary or protective right to counsel, those same safeguards must be extended to protect the primary right to main silent. Where an individual clearly refuses to waive his Miranda rights thereby asserting his right to remain silent, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been re-advised of his rights. Further, when an individual expresses his desire to remain silent, he is not subject to further interrogation on the original subject matter by the police unless the accused himself initiates further communications.

It is clear that in view of the safeguards provided in Miranda v. Arizona, supra, and Edwards v. Arizona, supra, the confessions made by Mr. Krier while in custody in Georgia were inadmissible at trial. If it is assumed, as it was by the Supreme Court of Georgia, that the defendant asserted his right to counsel, this Court's decision under Edwards prohibited further interrogation of Mr. Krier until he obtained the assistance of counsel. If it is assumed that Mr. Krier's refusal to waive his Miranda rights amounted only to an assertion of his right to remain silent, the ruling of this Court in Miranda mandates that the police could only continue interrogation after communication initiated by Mr. Krier or after

Mr. Krier obtained the assistance of counsel. Thus, the decision of the Supreme Court of Georgia must be reversed.

3. The jury's impermissible consideration of Petitioner's prior conviction for armed robbery.

In Furman v. Georgia, 408 U.S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153 (1976), reaffirmed this holding: "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id at 189, (Opinion of Stewart, Powell and Stevens, JJ.). This means that if a State wishes to authorize capital punishment, it has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 100 S.Ct. 1759 (1980), citing Gregg v. Georgia, supra, 428 U.S. at 198, Proffitt v. Florida, 428 U.S. 242, 253 (1974), and Woodson v. North Carolina, 428 U.S. 280, 303 (1974).

In the case now before this Court, Petitioner filed a pre-trial Motion in Limine requesting the Court to prohibit the State from introducing evidence of Petitioner's prior conviction for the offense of armed robbery. This motion was denied. (T. 258-261). Because of the Trial Court's ruling, Petitioner was forced to alter his trial strategy and introduce evidence of his prior armed robbery conviction and escape from prison. (T. 1225-1226, 1341-1354). At the close of the sentencing phase of the trial, the State introduced and the Trial Court admitted certified copies of Petitioner's prior conviction for armed robbery and sentence of 27 to 29 years. (T. 1314-1315). The jury was given

no limiting instructions on how it could apply Petitioner's prior conviction and sentence during its sentencing deliberations.

The sole ground upon which the Trial Court instructed the jury that the death penalty could be imposed was that the "offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." (T. 1489). Georgia Code Annotated §27-2534.1(b)(7). The Court did not instruct the jury that it could not use the Petitioner's prior conviction and escape in determining whether or not this statutory aggravating circumstance existed, thereby creating the danger that the jury did, in fact, use Petitioner's prior conviction and escape in finding the aggravating circumstance, even though it would be a wholly irrelevant consideration. The questions asked by the jurors before they rendered a decision on the sentence indicate that they were considering very strongly the fact that Petitioner had a prior conviction and had escaped from prison. (T. 1504; p. 6 of Report of the Trial Judge, attached hereto as Appendix D).

Because there were no limiting instructions by the Trial Court on the use of Petitioner's prior conviction and escape, it cannot be determined with the degree of certainty required in capital cases, that the evidence of the prior conviction did not make a critical difference in the jury's decision to impose the death penalty. See, Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). Because the jury's discretion was not sufficiently channeled, see, Godfrey v. Georgia, supra, the process in which the death penalty was imposed in this case was not "rationally reviewable," Woodson v. North Carolina, supra, and intended to diminish the reliability of the sentencing determination. See, Beck v. Alabama, 447 U.S. 625, 638 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Because the jury was not suitably limited in the use it could make of Petitioner's prior conviction and escape, the risk of an unwarranted death sentence was enhanced and, therefore, Petitioner's death sentence cannot stand.

CONCLUSION

The affirmance of Petitioner's conviction by the Georgia Supreme Court squarely contravenes the decision in several cases of this Court by denying Mr. Krier's right to have a jury consider all lesser included offenses within the charge of murder, by ignoring Mr. Krier's claim to a lawyer and the assertion of his rights under Miranda and allowing the jury to consider irrelevant factors in its determination of the sentence Mr. Krier was to receive. For these reasons, it is respectfully requested that this Court grant Certiorari.

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and sickness insurance premiums), 120-1-11-.04(4) (rebate of unearned credit household goods insurance premiums), 120-1-15-.05(b) (rebate of unearned maintenance charges). See also Code Ann. § 25-315 (e), Ga. L. 1977, p. 288. We agree.

The acceleration clause of the security deed provides: "In the event [the borrower] fails to pay any of said notes promptly at maturity or any interest thereon . . . then the entire debt secured by this deed shall become due and payable at once. . . ." The amount of debt secured by the deed is stated to be $3600.00. The borrower argues that the acceleration clause of the security deed contains no provision for rebates of unearned charges (interest, etc.) and that similar language in promissory notes has repeatedly been held to constitute contracting for a usurious amount under the ILA. See, e.g., *Diggs v. Swift Loan &c. Co.*, 154 Ga. App. 389, 390 (268 SE2d 433) (1980); *Blazer Financial Services v. Dukes*, 141 Ga. App. 663 (234 SE2d 149) (1977), and cases contained therein. We agree.

Thus, in this case we have a loan contract containing one usurious acceleration clause in the promissory note, a letter demanding usurious payment pursuant to the usurious provision in that note, a usurious acceleration clause in the security deed, and foreclosure under the security deed. The note, security deed and foreclosure thereunder were null and void. *Diggs v. Swift Loan &c. Co.*, supra; *Ga. Invest. Co. v. Norman*, 231 Ga. 821, 826 (204 SE2d 740) (1974); see Matter of Sprouse, 577 F2d 989, 993 (5th Cir., 1978). The foreclosure deed was therefore null and void. The trial court erred in denying the borrower's motion for summary judgment.

Judgment reversed. All the Justices concur.

DECIDED FEBRUARY 23, 1982.

Cancellation. Dougherty Superior Court. Before Judge Farkas.

W. E. Lockette, for appellant.

E. Louis Adams, for appellee.

37809. KRIER v. THE STATE.

SMITH, Justice.

Appellant, Wayne Ladd Krier, was indicted for the stabbing murder of Teresa Lavin. The jury found him guilty and also found that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim and recommended that the death penalty be imposed. The case is before on direct appeal and for

mandatory review of the death sentence. We affirm.

1. In his first two enumerations of error, appellant contends that the trial court erred in denying his motion to exclude his confession. He claims a violation of his Miranda rights under Edwards v. Arizona, 451 U. S. 477 (101 SC 1880, 68 LE2d 378) (1981), as well as a lack of probable cause to arrest at the time of the issuance of the arrest warrant.

a) In Edwards v. Arizona, supra, the U. S. Supreme Court held "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Id. at 484. The court also held that "an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id. We do not believe Edwards renders the confessions obtained in the instant case inadmissible.

Appellant was arrested in New Orleans at the request of Georgia authorities. The evidence is in conflict as to whether he exercised his right to remain silent, requested an attorney, or waived his rights. The following day, Georgia authorities arrived in New Orleans and went to the jail where appellant was being held. He was informed of his rights and signed a waiver. At this time, appellant was questioned about the whereabouts of one Daniel Cody, who had accompanied him to the victim's apartment complex. Appellant was not questioned as to his participation in the crime.

Counsel was appointed to represent appellant at his extradition hearing. Extradition was waived and appellant was brought back to Georgia. Upon his return, appellant was again advised of his rights, waived them, and made both a written and oral confession. These statements were introduced against him at trial.

From these facts, it is apparent that the instant case is distinguishable from Edwards in several important respects. First, it is not undisputed that appellant made a request for counsel while in the custody of New Orleans authorities. In addition, the confessions were obtained after appellant had been placed in the custody of Georgia authorities and brought back to this state, after extradition counsel had been discharged and appellant had been informed that he was entitled to counsel in Georgia, and after appellant had twice signed written waivers of his Miranda rights. See *Cervi v. State*, 248 Ga. 325 (282 SE2d 629) (1981); see also People v. Bartolomeo, 53

NY2d 933 (440 NYS2d 927) (1981). In our view it would be unreasonable to hold that an assertion of rights in the asylum state (assuming one occurred) operated to prevent any further inquiry by authorities in the requesting state as to whether the accused would like to speak to them, where the requesting authorities reasonably understood that no request for counsel had been made.

Finally, unlike Edwards, there is no doubt that appellant's confessions were obtained only after the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U. S. 458, 464 (58 SC 1019, 82 LE 1461) (1938). One of the investigators in the case testified that appellant "opened up almost instantly." Appellant detailed his crime to authorities on a number of occasions, and he provided a lengthy confession at the trial of his case.

We find no error under Edwards.

b) Probable cause for the issuance of an arrest warrant consisted of the following: Appellant and a co-worker went to the victim's apartment complex and signed in with the guard at 1:55 p.m. They signed out at 2:08 p.m. A next-door neighbor of the victim heard noises coming from the apartment and estimated the time to be approximately 2:30 p.m. (Appellant had returned to the apartment about 2:15 p.m., but this was unknown to police until the day after the warrant was issued.) The police also knew at the time the warrant was issued that appellant had not returned the borrowed car he was driving, had not returned to work, nor had anyone seen him since the afternoon of the murder. The police thought that the neighbor was in error as to the time, since all the other known facts pointed to appellant.

Appellant does not argue that any testimony given to the issuing magistrate was false. Rather, he contends that probable cause to arrest could not exist because of the "inconsistency" between the neighbor's testimony as to when he heard noises coming from the victim's apartment and the sign-out time stated in the apartment guard's log.

We must agree with the trial court's conclusion that the arrest warrant was based upon probable cause. Notwithstanding the minor inconsistency referred to above, the evidence presented to the issuing magistrate was such as would lead a reasonably cautious person to believe that appellant had committed the offense. *Hance v. State,* 245 Ga. 856 (268 SE2d 339) (1980).

2. Appellant also contends that the trial court impermissibly curtailed his right to cross examination in the course of pre-trial hearings and that this curtailment limited his efforts in establishing a lack of probable cause to arrest. The record, however, shows that the basic facts relating to the existence of probable cause

were stipulated, that appellant had been afforded extensive cross examination, and that the trial court's decision to deny appellant further cross examination was made at a time when further cross examination would have been pointless.

"The scope of cross examination lies largely within the discretion of the trial court. It will not be disturbed by this court unless it is shown there has been an abuse of that discretion. No such abuse is disclosed by this record." *Davis v. State,* 230 Ga. 902, 904 (199 SE2d 779) (1973).

The propriety of the trial court's action in the case at bar is highlighted by appellant's subsequent "offer of proof" as to what further cross examination would show. The offer included nothing that had not already been stipulated or established through testimony.

3. In his fourth enumeration of error, appellant contends that the trial court erred in excluding a juror as being unalterably opposed to capital punishment.

The following transpired on voir dire:

"Q. Are you conscientiously opposed to capital punishment?

A. I am.

Q. You are conscientiously opposed?

A. Yes.

The Court: Let me ask you some questions. Ms. Henry, are your reservations about the death penalty or capital punishment such that you could never impose the death penalty, regardless of the evidence and the instructions of the Court.

A. I wouldn't say never.

The Court: Are there some circumstances in some cases then in which you would impose the death penalty?

A. I believe I could.

Q. So, Ms. Henry, when you said to my question it was just out of the blue, and I realize that, that you were conscientiously opposed to the death penalty, is what you meant that you have serious reservations about it?

A. Yes, I do.

Q. Well, in this case, Mr. Krier is charged with the offense of murder for killing an individual with a knife, and you, of course, have not heard any of the evidence in the case, can you say whether or not you would, it is possible that you could, if the circumstances and law warranted it, is it possible that you could vote for a death in this case?

A. I don't think so.

Q. If you would, please, ma'am, I'm just trying to find out exactly what your feelings are. How do you distinguish this particular case, the one that you would sit on as a juror, as compared to what the

Court asked you about, if you could impose the death penalty in some circumstances?

Ms. Henry: Will you rephrase that?

The Court: What he is getting at, I asked you if your reservations about the death penalty was such that you could never impose the death penalty and you said no, and you said there were some instances in which you could impose the death penalty. Not knowing anything about this case about which you are about to try, in answer to the question Mr. Peters just asked you, you said that you didn't think that you could impose it in this case. What we are wondering is how do you know you can or can't or you could impose it in this case?

Ms. Henry: I reckon I should say I don't think I could in any case, really.

The Court: Are your own personal feelings such that you could personally never impose the death penalty?

Ms. Henry: I believe so.

The Court: Are you saying that you believe that the death penalty is proper in some cases, but just you could never personally be a part of imposing it?

Ms. Henry: I believe so.

The Court: Well, excuse me for pressing you on this, but is it your position now that you would vote against the death penalty regardless of the facts and evidence presented to you in this case?

Ms. Henry: In this particular case?

The Court: Yes.

Ms. Henry: I really don't think I could ever vote for the death penalty in any case.

The Court: And you have already made up your mind, then, that if this defendant was convicted of this offense, that in that event you would vote to impose life imprisonment solely because of your opposition to the death penalty, is that right?

Ms. Henry: Yes.

The Court: I am going to excuse this juror then for cause . . ."

In our view, the above testimony unequivocally shows that the potential juror would vote against the death penalty regardless of what transpired at trial. Thus, the trial court did not err in excusing her. Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968); *Blankenship v. State,* 247 Ga. 590 (4) (277 SE2d 505) (1981).

4. Appellant asserts that the trial court erred in failing to charge on voluntary manslaughter, as he had requested.

In his initial confession, appellant stated: "[W]hile we were smoking [a] joint, I just reached over and touched her or something . . . [S]he stood up and started hitting me real hard on the chest." Appellant admitted hitting the girl in response, but could not remember anything else. Later in the interview, however, appellant recalled that "I wasn't mad."

At a later confession, appellant related the events he previously could not remember. He stated that "I put my hand up on her shoulder" and that the victim began "beating on me with the ball of her fist, like my chest was a little drum or something." "I took my hand and kind of both hit and pushed her away at the same time . . . I hit her and when she started coming back at me I took the knife out of my pocket. And you know I didn't intend on using it. I never have. You know, so when she came I took a swing at her — and I hit her with the knife and caught her in the throat . . . I hit her trying to knock her down and knock her out or something, just quiet her down, you know . . ." According to appellant, he then went into the bathroom to wash off, and while there, the victim came at him again. "When she came running at me again I hit her . . . and it cut her again in the face. And then knocked her down, and I took and laid down the knife deliberately because I realized I cut the girl again . . . I took my hand and balled it and I just hit her, trying, almost about trying to knock out a man just so I could leave."

At trial, appellant told a somewhat different story: "I think I called her name or something, I don't remember, and she didn't answer. So I reached up . . . and I grabbed her arm kind of to get her attention more than anything else . . . and she just turned around — and just the look on her face . . . [S]he just kept staring at me, you know, all of a sudden I felt the big complex thing and I slapped her." The victim, who previously had been vacuuming her apartment, had the vacuum cleaner tube "still in her hand and when I hit her she went . . . like she was going to fall . . . but the tube actually stopped her from falling . . . [W]hen she came back she swung with the tube . . . I took the knife out and said . . . stay away from me. I swung the knife and the knife caught her in the throat."

The above evidence does not authorize a finding that appellant acted "solely as the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . ." Code Ann. § 26-1102. On two occasions prior to trial, appellant admitted that his "passion" was not aroused. At trial, appellant admitted there had been no serious provocation. Accordingly, we find no error in the trial court's failure to charge in accordance with appellant's request. See *Jones v. State,* 246 Ga. 109 (269 SE2d 6) (1980).

5. Appellant, in his sixth and seventh enumerations of error, argues that the trial court erred in not giving definitional guidelines for the interpretation of the "(b) (7)" aggravating circumstance and

in failing to instruct the jury that they could not consider defendant's previous armed robbery conviction in determining his sentence.

In *Gilreath v. State,* 247 Ga. 814 (16) (279 SE2d 650) (1981), this court held: "While we do not read Godfrey [v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980)] as holding that no death sentence imposed on the basis of this aggravating circumstance may stand absent clarifying instructions by the trial court, we find it unnecessary to decide that question here because there was no request for clarifying instructions. Moreover, all of the terms of Code Ann. § 27-2534.1 (b) (7) are words of ordinary significance which require no explication . . ." See Westbrook v. Zant, 518 FSupp. 1262 (2) (5th Cir. 1981); *Cape v. State,* 246 Ga. 520 (272 SE2d 487) (1980).

Contrary to appellant's assertions, the jury could not have erroneously understood that a death penalty could be returned on a non-statutory aggravating circumstance — i.e., the prior armed robbery conviction. The trial court's instructions clearly informed the jury that they must find a statutory aggravating circumstance, as defined by the court, before being allowed to go further and determine sentence. *Hardy v. State,* 245 Ga. 272 (264 SE2d 209) (1980).

6. Appellant contends the trial court's charge on voluntary intoxication is burden-shifting on the issue of intent and therefore violative of Sandstrom v. Montana, 442 U. S. 510 (99 SC 2450, 61 LE2d 39) (1979).

The trial court charged: "Voluntary intoxication by use of alcohol, drugs or narcotics is no excuse for crime. The fact that one accused of a crime was under the influence of alcohol, drugs or narcotics at the time of the alleged crime may be shown as illustration of his motive in the transaction, but one voluntarily under the influence of alcohol, drugs or narcotics is presumed to intend the legitimate consequences of his acts, and the question is whether he intended to do the act or whether he intended the consequences of his act. If a person under the influence of alcohol, drugs or narcotics is sufficiently intelligent to know, understand and intend to do a certain act and to understand that certain consequences are likely to result from it, and does the act, he is then criminally liable for the consequences of the act."

We do not view the above charge as defective under Sandstrom. See *Blankenship v. State,* supra at 592-593. It informed the jury that voluntary intoxication is not an excuse for a criminal act and that if a person under the influence of drugs or alcohol is able to intend his act and understand that certain consequences are likely to result from it, he is criminally responsible for those consequences. The jury, of course, was instructed that the state bore the burden of establishing all elements of the offense beyond a reasonable doubt. See *Moses v. State,* 245 Ga. 180 (263 SE2d 916) (1980).

Sentence Review

7. Code Ann. § 27-2537 (c) provides that "[w]ith regard to the sentence, [this] court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether . . . the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1 (b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant."

The evidence adduced at trial authorized the jury to find the following:

Appellant escaped from a penal institution in North Carolina where he had been serving a term for armed robbery. He made his way to Atlanta, and using the name Nick Michael Cordoba, obtained a job at Guthrie's Carnivals. At the time the homicide took place, the carnival was located at a Zayre department store.

The victim, Teresa Lavin, a 22-year-old student at Georgia State University, lived in the Chesterfield Apartments with Ms. Bartlett Carpenter, her son Brad, and Mr. Mark Butcher.

A few days prior to her death, Ms. Lavin was babysitting for the young child while Ms. Carpenter and Mr. Butcher were out of town. She took the young boy and his school mate, who lived in the apartment above, to the carnival. According to appellant's statement, the victim came up to him at the carnival where he was selling tickets for a ride. She approached appellant and asked him if he had any marijuana. He replied that he did not, but that he may be able to locate some at a later time. She then wrote her name and phone number on a ticket and gave it to him. Appellant called the victim that night. She told him that there were a lot of people at her apartment and that he should come over at 11:00 the next morning. When he arrived the next day, she answered the door in a nightgown, told him that she forgot he was coming over and to telephone her later because somebody was there.

On the day of the homicide, appellant and one Daniel Cody went over to the victim's apartment complex in a car which appellant had borrowed from a girl friend. They checked in with the security guard, who took appellant's name and license tag number. Unable to find the victim's apartment, appellant and Cody left, signing out with the security guard as they exited. Appellant then went and got something to eat, took two quaalude tablets and a "hit" of LSD. He then went back alone to the victim's apartment. This time the security guard

allowed him to go through but did not sign him in or out.

When appellant got to the victim's apartment, she was vacuuming. She let him in and they smoked some marijuana. He helped her clean the apartment for a while and then he lit another "joint." While he was smoking it he made some type of advance towards her or touched her on the shoulder. She turned and stared at him. He then slapped her so hard it spun her around. In self-defense, she swung the vacuum cleaner tube at him. He then took out a "hawk bill" knife and proceeded to literally rip the victim apart. He also beat the victim with the telephone receiver when, at one point, she attempted to call for help. After he had finished, he washed the blood off in the bathroom of the apartment and put on a vest he found. Leaving his bloodstained shirt in the apartment, appellant fled. He drove the automobile back to the carnival, left his bloodstained pants and knife in the carnival truck and drove to Birmingham. In Birmingham he sold the car he had "borrowed" from his girl friend for $95, and bought a bus ticket to New Orleans, where he stayed in a cheap hotel for two days before being arrested.

From the evidence adduced at trial, any rational trier of fact could have found beyond a reasonable doubt that appellant was guilty of the offense of murder. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

Because the sentence of death in this case rests upon the aggravating circumstance set forth in Code Ann. § 27-2534.1 (b) (7), it must be reviewed in light of the U. S. Supreme Court's decision in Godfrey v. Georgia, supra, as construed by this court in *Hance v. State,* supra.

The "(b) (7)" aggravating circumstance ". . . consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated batter[y] to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining '(w)hether . . . the evidence supports the jury's or Judge's finding of (this) statutory aggravating circumstance . . .' (Code Ann. § 27-2537 (c) (2)), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component . . ." *Hance v. State,* supra at 860-861.

"The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish . . . murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Godfrey v. Georgia, supra. . . . Torture occurs when the victim is subjected to

serious physical abuse before death . . . [(] The death of a victim who dies instantaneously with little or no forewarning does not involve torture. [)] . . . [T]he fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i.e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind." Id. at 861-862. See *Gilreath v. State,* supra.

The victim in this case was not killed instantly, but was cut 12 times with a knife and subjected to a serious, vicious beating. By appellant's own admission, the victim was still alive when he left the apartment. The evidence established that the young victim suffered three very deep lacerations on the right side of the face, one above the forehead, one on the right cheek, and one extending from the left side of the nose across the upper lip and across the lower lip, two deep lacerations beneath the jaw on the left side, and a large laceration that extended from the right side of the neck to the back of the neck. This wound cut through all the muscles of the neck and blood vessels. The force of the knife displaced a bone in the neck so that it dislocated the spine. Further, there was a laceration extending from the top of the left breast across the breast and abdomen, extending down to the pants line. The back of the right hand of the victim had three small cuts and there were abrasions around the chin, upper lip area, neck and right collarbone area. The victim had bruises on the right side of the face, over both shoulders and over both arms. The injuries to the face were so forceful that the lip was broken and the bone above the front teeth was fractured. Forensic evidence established that these abrasions were caused when she was beaten with the receiver of a telephone. Only two and one half to three inches of tissue were left intact on the victim's neck and that was all that kept the victim from being completely decapitated. The injuries indicated that the victim had to be braced against the floor or wall so that the force of the major cutting wound to the neck could be applied. The victim died either from bleeding to death, shock, or aspirated blood. Appellant fled the scene and attempted to hide his crime. See Godfrey v. Georgia, supra.

The victim was a 22-year-old female, 5 feet, 4 1/2 inches in height, and weighing 120 pounds. Appellant is 6 feet tall and strong enough that the force of the blow of the telephone receiver against the victim resulted in the mouthpiece being broken off and landing half way across the room. The victim posed no threat to appellant.

The jury's finding of the "(b) (7)" aggravating circumstance is supported by the evidence. Jackson v. Virginia, supra. "Under the evidence of this case, [appellant's conduct] was of such a nature as to go to the very core of Code Ann. § 27-2534.1 (b) (7)." *Hance v. State,*

supra at 867. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. Cases selected for comparison included those cases involving death sentences or those involving life sentences for homicides in which the victim suffered severe physical abuse prior to death. Although, as appellant argues, lesser sentences than death are sometimes imposed in such cases, rarely is the death penalty not imposed. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976); *Coley v. State,* 231 Ga. 829 (204 SE2d 612) (1974). Moreover, it is readily apparent from the comparison of cases which are listed in the appendix attached hereto that murderers who have severely tortured their victims are not a "capriciously selected group of offenders." Gregg v. Georgia, supra. The cases listed in the appendix support the affirmance of the death penalty in this case — appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

8. We have reviewed the trial court's charge to the jury and found that it is not subject to the defects dealt with in *Hawes v. State,* 240 Ga. 327 (240 SE2d 833) (1977), or *Fleming v. State,* 240 Ga. 142 (240 SE2d 37) (1977).

9. In his final enumeration of error, the appellant attacks the constitutionality of the Georgia death penalty statute on the grounds of prosecutorial discretion. The same argument has been raised before and decided contrary to appellant's position. He advances no new argument in support of his assertion. Gregg v. Georgia, supra; *Moore v. State,* 240 Ga. 807 (243 SE2d 1) (1978) and cits; see *Knight v. State,* 243 Ga. 770 (257 SE2d 182) (1979).

Judgment affirmed. All the Justices concur, except Weltner, J., not participating.

DECIDED FEBRUARY 23, 1982.

Murder. DeKalb Superior Court. Before Judge Federal.

Stroud P. Stacy, for appellant.

Lewis R. Slaton, District Attorney, H. Allen Moye, Assistant District Attorney, Arthur K. Bolton, Attorney General, William B. Hill, Jr., Assistant Attorney General, for appellee.

APPENDIX.

McCorquodale v. State, 233 Ga. 369 (211 SE2d 577) (1974); *Owens v. State,* 233 Ga. 869 (214 SE2d 173) (1975); *Birt v. State,* 236 Ga. 815 (225 SE2d 248) (1976); *Coleman v. State,* 237 Ga. 84 (226 SE2d 911) (1976); *Street v. State,* 237 Ga. 307 (227 SE2d 750) (1976); *Hill v. State,* 237 Ga. 794 (229 SE2d 737) (1976); *Dix v. State,* 238 Ga. 209 (232 SE2d 47) (1977); *Bowden v. State,* 239 Ga. 821 (238 SE2d 905) (1977); *Corn v. State,* 240 Ga. 130 (240 SE2d 694) (1977); *Stanley v. State,* 240 Ga. 341 (241 SE2d 173) (1977); *Campbell v. State,* 240 Ga. 352 (240 SE2d 828) (1977); *Lamb v. State,* 241 Ga. 10 (243 SE2d 59) (1978); *Griggs v. State,* 241 Ga. 317 (245 SE2d 269) (1978); *Westbrook v. State,* 242 Ga. 151 (249 SE2d 524) (1978); *Spraggins v. State,* 243 Ga. 73 (252 SE2d 620) (1979); *Bowen v. State,* 244 Ga. 495 (260 SE2d 855) (1979); *Hardy v. State,* 245 Ga. 272 (264 SE2d 209) (1980); *Hance v. State,* 245 Ga. 856 (268 SE2d 339) (1980); *Nelson v. State,* 247 Ga. 172 (274 SE2d 317) (1981); *Justus v. State,* 247 Ga. 276 (276 SE2d 242) (1981); *Messer v. State,* 247 Ga. 316 (276 SE2d 15) (1981); *Cervi v. State,* 248 Ga. 325 (282 SE2d 629) (1981).

38052. GOUGE et al. v. CITY OF SNELLVILLE et al.

JORDAN, Chief Justice.

This case concerns the constitutionality of a Snellville zoning ordinance which provides that "structures shall be permitted only in rear yards. . . ." A structure is defined as "anything constructed or erected on the ground or attached to something on the ground." The appellant-landowner was enjoined from maintaining in his front yard a satellite television antenna used for personal and business purposes. He sells these antennas out of his home under a valid business license from the City.

The satellite antenna in question was erected in Mr. Gouge's front yard. The antenna is approximately 12 feet wide by 12 feet high and is secured to the ground at four locations by a concrete base and angle iron supports. The antenna was constructed with a redwood frame covered by an aluminum wire mesh. Mr. Gouge states that the antenna was designed to receive broadcast transmissions from a certain satellite, and that the only place on his property reception was possible was his front yard due to the topography of his lot and the necessity of a direct, unobstructed line of sight to the satellite.

The City of Snellville wrote a letter demanding removal of the antenna, and Mr. Gouge brought suit. The City prevailed, obtaining a declaratory judgment granting a temporary and permanent injunction enforcing Article III and Article IV § 600 of the Snellville Zoning Ordinance against Mr. Gouge, thereby restraining him from

DEPARTMENT OF POLICE NEW ORLEANS, LA.

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

ARRESTEE NAME			RACE	SEX	BIRTH DATE	HEIGHT	WEIGHT	HAIR	EYES	SKIN	ARREST NUMBER
PIER	WAYNE	L	W	M	090648	600	165	BRO	BRO	RUD	80AA7326

ARRESTEE ADDRESS		CITY	STATE	BIRTH STATE	NATIONALITY	BUREAU NUMBER
201	MAGAZINE ST	CITY	LA	TN	US	

OCCUPATION	EMPLOYER	MISC NUMBER
		80538546

ALIAS NAME	MARITAL STATUS	SOCIAL SEC NO	OPERATOR'S LICENSE NO	LIC ST
	SINGLE	133382435		

SCARS TATTOOS ETC

SCLCHA

ADDRESS

ESTIMATED

IF ARRESTEE DESCRIBE BY WHOM AND IF TREATED. IF INTOXICATED DESCRIBE TO WHAT DEGREE

NO

DISPOSITION

VEHICLE INVOLVED: LICENSE NUMBER	VEH ST	YEAR	VEH TP	MAKE	MODEL	TYPE	COLOR	VEHICLE IDENTIFICATION NUMBER

ARREST DATA

LOCATION OF ARREST		DIST & ZONE	DATE OF ARREST	TIME OF ARREST	DATE BOOKED	TIME BOOKED	ITEM NUMBER
201	MAGAZINE ST	1C	100879	1015 PM	100979	1209 AM	J0849679

ARRESTING OFFICER'S NAME		OFFICER'S SER	UNIT	ARREST CHARGE
REECH	L	817	116	01
ASSISTING OFFICER'S NAME		OFFICER'S SER	UNIT	
JONES	W		118	

CHARGES AND COURT SCHEDULE

ID NAME STATUTE NO	AFFIDAVIT NO	RELATIVE TO — FOR ADDITIONAL CHARGES USE SUPPLEMENTARY ARREST REGISTER
WARRANT	12109	FUGITIVE FROM ATLANTA GA. FOR MURDER

COURT OF TRIAL	SECTION	DATE OF TRIAL	TIME OF TRIAL
CDC	H		

BOND

OFFENSE DATA

LOCATION OF OFFENSE		DATE OF OFFENSE	TIME OF OFFENSE	DAY OF WEEK	WEAPON
201	MAGAZINE ST	100879	1015 PM	MONDAY	

COMPLAINANT'S OR WITNESSES NAME		RACE	SEX	BIRTH DATE
ADDRESS	CITY	STATE	TELEPHONE NUMBER	
COMPLAINANT'S OR WITNESSES NAME		RACE	SEX	BIRTH DATE
ADDRESS	CITY	STATE	TELEPHONE NUMBER	

REMARKS AS TO DESCRIPTION OF ARREST USE SIDE FOR INFORMATION NOT PROVIDED IN BLOCKS

HOMICIDE DETECTIVE DYKES OF ATLANTA NOTIFIED BY DETECTIVE NORMAN PIERCE AND DE
CTIVE MARTIN VENEZIA. THE SUBJECT WAS ARRESTED THIS TIME AND DATE BY POLICE OF
CERS LARRY REECH AND WILLIAM JONES AT 201 MAGAZINE ST. LOCATION OF THE BAPTIST
ISSION. SUBJECT ADVISED OF RIGHTS BY OFFICER REECH, WHICH HE CHOSE NOT TO WAI
ARRESTED SUBJECT STATES THAT HE WISHES TO WAIVE EXTRADITION AND VOLUNTARY RET
N TO GEORGIA.

ARRESTED BY: W. POWERS — 1109 PM

SIGNATURE: V. GIOVENCO

Fugitive Warrant # 17-109 Georgia

CLASSIFICATION

4. VICTIM'S NAME (LAST, FIRST, MIDDLE) Unknown	RACE	SEX	DATE OF BIRTH
5. PERSON WHO DISCOVERED INCIDENT N/A	RACE	SEX	DATE OF BIRTH
19. PERSON REPORTING INCIDENT Reporting Officers	RACE	SEX	DATE OF BIRTH
21. WITNESS NAME	RACE	SEX	DATE OF BIRTH
WITNESS NAME	RACE	SEX	DATE OF BIRTH
24. WANTED ☐ ARRESTED ☒ NAME Krier, Wayne	RACE W	SEX M	DATE OF BIRTH 9-6-48
WANTED ☐ ARRESTED ☐ NAME	RACE	SEX	DATE OF BIRTH

7. TIME 1- Dec-79	8. DAY OF WEEK Monday	9. CLEARED 11	10. ARRESTED 11
11. DATE OCCURRED 10-8-79 10:30 P.M.	11. DAY OF WEEK OCCURRED Monday		11. DATE ARRESTED 10-8-79 10:30 P.M.

10. LOCATION OF OCCURRENCE: NUMBER STREET API
Atlanta, Georgia

12. RESIDENCE ADDRESS			13. RESIDENCE PHONE / 14. BUSINESS PHONE
16. RESIDENCE ADDRESS			17. RESIDENCE PHONE / 18. BUSINESS PHONE
20. RESIDENCE ADDRESS			21. RESIDENCE PHONE / 22. BUSINESS PHONE
RESIDENCE ADDRESS			RESIDENCE PHONE / BUSINESS PHONE
RESIDENCE ADDRESS			RESIDENCE PHONE / BUSINESS PHONE

HEIGHT	WEIGHT	BUILD	COMPLX.	HAIR	EYES	
HEIGHT	WEIGHT	BUILD	COMPLX.	HAIR	EYES	

25. TYPE PREMISES WHERE OCCURRED	26. PROPERTY INVOLVED WAS FIRE REPORT: DAMAGED ☐ DESTROYED ☐	VALUE OF PROPERTY $	ARSON SUSPECTED YES ☐ NO ☐

FIRE MARSHALL NOTIFIED YES ☐ NO ☐

27. NAME INJURED ☐ DEATH ☐	RACE	SEX	DATE OF BIRTH	RESIDENCE ADDRESS
NAME INJURED ☐ DEATH ☐	RACE	SEX	DATE OF BIRTH	RESIDENCE ADDRESS

28. EMERG. AID GIVEN YES ☐ NO ☐ BY UNIT:

29. CAN OFFENDER BE IDENT. BY: VICTIM ☐ WITNESS ☐ NO ☐

30. NARRATIVE:

On Monday, October 8, 1979, received a teletype message from Atlanta, Georgia P.D. that above arrested subject was wanted for murder by that jurisdiction, under warrant number 17-109. Detectives Venezia and Pierce received a telephone call from Detective Dykes of Atlanta P.D., that subject was expected to come to N.O., La., and register at the Baptist Mission., Several wanted checks were made, and the subject was apprehended by Police Officers Larry Reech and William Jones, at # 261 Bergaine, at 10:30 P.M., 10-8-79. Subject was transported to/ N.O.P. Office where he refused to waive his rights for questioning. However, subject states that he will waive extradition. Det. Dykes of Atlanta notified by Pierce. Dykes will come to N.O., today Tuesday, 10-9-79. Subject booked as a fugitive.

31. DIVISION REPORTING

34. ACCESS NUMBER

32. REPORTING OFFICER Pierce	BADGE	REPORTING OFFICER Martin Venezia	BADGE	SUPERVISOR APPROVING Sgt. Paul Drought

33. DATE OF REPORT 10-9-79

DO NOT WRITE IN THIS BLOCK

RECORDS DIVISION

Report of the Trial Judge

of the

Superior Court of DeKalb County, Georgia

The State vs. Wayne Leon Kirby 267-79
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Kirby Wayne Leon 2. Date of Birth 6 6 41
Last First Middle Mo. Day Year

3. Social Security Number 133 38 9435
4. Sex M [X] F [ ]
5. Marital Status: Never Married [ ]
Married [ ]
Divorced [X]
Spouse Deceased [ ]

6. Children
(a) Number of children 0
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

7. Father living: Yes [ ] No [X] If deceased, give date of death 1973
8. Mother living: Yes [ ] No [X] If deceased, give date of death [illegible]
9. Number of children born to parents 0 natural children - 2 adopted
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 (14) 15 16 1
(Circle one) [college

11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [X]

12. Psychiatric Evaluation Performed: Yes [X] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [X] [ ]
b. Able to adhere to the right? [X] [ ]
c. Able to cooperate intelligently in his own defense? [X] [ ]
13. If examined, were character or behavior disorders found? Yes [X] No [ ]
(If answer is yes, please elaborate) Kirby was found to have an [illegible] personality

14. What other pertinent psychiatric [and psychological] information was reveale
None

15. Prior work record of defendant:

	Type Job	Pay	Dates Held	Reason for Terminatic
a.	Playground Worker		9/71 — 10/71	arrest
b.	store manager (Dairy Queen)		1971	
c.	ambulance driver		1971-1972	
d.	construction worker		various times	
e.				

*A separate report must be submitted for each defendant sentenced to death.

ne case tried with or without jury? With [X] Without [ ]

did the defendant plead? Guilty [ ] Not guilty [X]

The defendant stood mute; a plea of not guilty was entered for him

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:

a.	Treason	[ ]
b.	Murder	[X]
c.	Kidnapping for Ransom	[ ]
d.	Kidnapping where Injury Results . .	[ ]
e.	Aircraft Hijacking.	[ ]
f.	Rape	[ ]
g.	Armed Robbery	[ ]

2. Were other offenses tried in the same trial? yes [ ] no [X]

If other offenses were tried in the same trial list those offenses.

a. _____

b. _____

c. _____

d. _____

3. If tried with jury, did the jury recommend the death sentence? Yes [X] No [ ]

4. Statutory aggravating circumstances found: Yes [X] No [ ]

5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or	[ ]	[ ]
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[X]	[ ]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

k. List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. 1) Armed robbery conviction in North Carolina 1972. Sentenced to Serve 27-27 years

b. 2) Escape from North Carolina prison August 1977

c. _____

d. _____

7. Was there evidence of mitigating circumstances? Yes [X] No [ ]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.	[ ]
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[X]
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

...e defendant acted under duress or under the domination of another person. [ ]

...t the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [X]

h. The youth of the defendant at the time of the crime. [ ]

i. Other.
Please explain if (i) is checked _____

_____

_____

9. If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [X] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [X]

13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant?
No [X]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant?
No [ ]
Casual Acquaintance [X]
Friend [ ]

16. Was the victim local resident or transient in the community?
Resident [X]
Transient [ ]

17. Was the victim the same race as defendant? Yes [X] No [ ]

18. Was the victim the same sex as the defendant? Yes [ ] No [X]

19. Was the victim held hostage during the crime?
No [X]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community:
Good [ ]
Bad [ ]
Unknown [X]

21. Was the victim physically harmed or tortured? Yes [X] No [ ]
If yes, state extent of harm or torture: The victim was slashed several times with a knife, and was almost decapitated.

Was the age of the victim? 22

A weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[X]
Firearm	[ ]
Other _____	[ ]

4. Does the defendant have a record of prior convictions? Yes [X] No [ ]

5. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

	Offense	Date of Offense	Sentence Imposed
a.	Armed robbery	1970	2 to 20 years
b.			
c.			
d.			

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [X] No [ ]

27. Was the defendant a local resident or transient in the community?

Resident	[ ]
Transient	[X]

D. Representation of Defendant *

1. Date counsel secured _____

2. How was counsel secured? a. Retained by defendant [ ]
   b. Appointed by Court [X]

3. If counsel was appointed by court was it because
   a. Defendant unable to afford counsel? [X]
   b. Defendant refused to secure counsel? [ ]
   c. Other (explain) _____

4. How many years has counsel practiced law? a. 0 to 5 [X]
   b. 5 to 10 [ ]
   c. over ten [ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
   b. General [ ]
   c. Mostly criminal [X]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. If not, explain in detail _____

* (If more than one counsel served answer the above questions as to each counsel and attach to this report.)

D. Representation of Defendant * Co-counsel

1. Date counsel secured _____

2. How was counsel secured? a. Retained by defendant [ ]
   b. Appointed by Court [X]

3. If counsel was appointed by court was it because
   a. Defendant unable to afford counsel? [X]
   b. Defendant refused to secure counsel? [ ]
   c. Other (explain) _____

4. How many years has counsel practiced law? a. 0 to 5 [ ]
   b. 5 to 10 [X]
   c. over ten [ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
   b. General [ ]
   c. Mostly criminal [X]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. If not, explain in detail _____

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [ ]
d. 50 to 75% . . . . . [X]
e. 75 to 90% . . . . . [ ]
f. Over 90% . . . . . [ ]

4. Were members of defendant's race represented on the jury? Yes [X] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [ ]

7. Was there extensive publicity in the community concerning this case? (See below) Yes [X] No [ ]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [ ]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]

11. If answer is yes, what was that evidence? [illegible]

12. In your opinion, was the death sentence imposed in this case appropriate? Yes [ ] No [ ]

General comments concerning your answer: I don't know

F. Chronology of Case

		Elapsed Days
1. Date of Offense	September 21 1971	
2. Date of Arrest	October 1 1979	12
3. Date Trial Began	February 13 1980	133
4. Date Sentence Imposed	February 22 1980	3

Note on E.,7.): There was substantial publicity immediately after the crime was committed, although there was little or no publicity surrounding the trial.

... post trial motions ruled on May 12, 1981 — 445

Date Trial Judge's Report Completed _____

_____ — 45

7. *Date received by Supreme Court _____

_____ — _____

8. *Date sentence review completed _____

_____ — _____

9. *Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached (X)
2. He stated he had no comments ( )
3. He has not responded ( )

_____ — _____

Date — Judge, Superior Court of

_____ County

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

RECEIVED
APR 26 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 81 6598

WAYNE LADD KRIER, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

Motion to Proceed In Forma Pauperis

Petitioner, Wayne Ladd Krier, respectfully prays that he be allowed to proceed in forma pauperis in his Petition for a Writ of Certiorari to the Georgia Supreme Court from a judgment entered on February 23, 1982, affirming Petitioner's conviction on a charge of murder and imposition of the sentence of death. 249 Ga. 80 (1982). In support of this motion, Petitioner shows the following:

(1) Petitioner has been incarcerated since October, 1979, and has had no income from any source since that time.

(2) Petitioner was represented by the Public Defender of DeKalb County, Georgia at the trial of his case.

(3) Petitioner was represented by the Public Defender of DeKalb County on the appeal of this case to the Georgia Supreme Court. Petitioner sought and was granted leave to proceed in forma pauperis by the Georgia Supreme Court.

(4) In the aforementioned Petition for Writ of Certiorari, Petitioner is represented by Stroud P. Stacy, Esquire who is providing his legal services at no cost to the Petitioner.

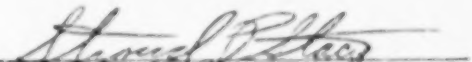
(5) Petitioner is unable because of his poverty to pay the cost of any proceedings before this Court or to give security therefor. (See Petitioner's Affidavit of Poverty attached hereto as Exhibit A.)

(6) The issues presented in the aforementioned Petition for Writ of Certiorari are done with the belief that Petitioner

is entitled to redress.

WHEREFORE, Petitioner prays that he be granted leave to proceed in forma pauperis.

Respectfully submitted,



STROUD P. STACY
Attorney for Petitioner

Suite 240
246 Sycamore Street
Decatur, Georgia 30030
(404) 373-4562

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

No. 81 6598

WAYNE LADD KRIER, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

Affidavit in Support of Motion to Proceed on
Writ of Certiorari in Forma Pauperis

I, WAYNE LADD KRIER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

1b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   October, 1979. Unknown.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wayne Ladd Krier

WAYNE LADD KRIER

SUBSCRIBED AND SWORN TO
before me this 23rd day
of April, 1982.

Harold R. Stacy

NOTARY PUBLIC, State of Georgia
My commission expires
February 3, 1986.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE, UNITED STATES SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

No. _____

WAYNE LADD KRIER, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

Affidavit of Attorney

I, Stroud P. Stacy, being first duly sworn, depose and say that I am the attorney for the Petitioner in his Petition for Writ of Certiorari to the Georgia Supreme Court from a judgment entered by it on February 23, 1982. 249 Ga. 80 (1982). My legal services are being provided at no cost to the Petitioner or any other person. I represented Petitioner as trial counsel and as counsel for appeal before the Georgia Supreme Court where Petitioner was granted leave to proceed in forma pauperis.

Stroud P. Stacy

STROUD P. STACY

Sworn to and subscribed before
me this 23rd day of April, 1982.

Cindy Cook

NOTARY PUBLIC, State of Georgia

KD J

ORIGINAL

RECEIVED
MAY 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-6598

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WAYNE LADD KRIER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-Record for
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3358

10

QUESTIONS PRESENTED

I.

Whether the trial court committed constitutional error by refusing to charge the jury on voluntary manslaughter in a death case?

II.

Whether Petitioner's statements were properly admitted into evidence when there was contradictory evidence ot Petitioner's refusal to waive his Miranda rights to authorities in the asylum state?

III.

Whether the trial court's instructions on statutory aggravating circumstances properly channeled the jury's consideration?

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NO. 82-6598

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WAYNE LADD KRIER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner was indicated in DeKalb County, Georgia, during the September Term of 1979 for the murder of Teresa Lavin. Following a trial by jury, Petitioner was convicted of murder and the jury imposed the death sentence. Petitioner's Motion for New Trial was denied by the trial court and Petitioner filed a Notice of Appeal to the Supreme Court of Georgia on June 9, 1981.

On direct appeal, Petitioner enumerated nine errors; only three of those are raised in the present petition. The Supreme Court of Georgia affirmed the conviction as well as the death sentence pursuant to the statutory sentence review procedure. See Krier v. State, 249 Ga. 80, 287 S.E.2d 531 (1982).

Further facts will be developed, as necessary, for a more thorough illumination of any issue in this petition for a writ of certiorari.

PART TWO

SUMMARY OF ARGUMENT

I.

Based on the evidence adduced at Petitioner's trial, a charge on voluntary manslaughter was not warranted under Georgia law. The present case is not controlled by Beck v. Alabama, infra, where the State court was absolutely precluded, by statute, from instructing on lesser offenses in capital cases.

II.

Petitioner's written and recorded statements given to Georgia authorities were not rendered inadmissible by virtue of contradictory evidence of Petitioner's refusal to waive his Miranda rights when first taken into custody by New Orleans police. Edwards v. Arizona, infra, is distinguishable because Petitioner's refusal to waive his rights is disputed and because Georgia authorities had no knowledge of Petitioner's alleged assertion of his right to remain silent.

III.

During the sentencing phase, the jury was properly instructed as to the statutory aggravating circumstance; examination of the jury instructions clearly rebuts Petitioner's contention that the jury may have used his prior armed robbery conviction and escape for the basis for imposition of the death sentence.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT AND THE GEORGIA SUPREME COURT PROPERLY DETERMINED AS A MATTER OF LAW THAT THE EVIDENCE ADDUCED AT PETITIONER'S TRIAL DID NOT WARRANT A CHARGE ON VOLUNTARY MANSLAUGHTER.

Following the close of evidence at the guilt-innocence phase of trial and Petitioner's written request for a charge on voluntary manslaughter, the trial judge refused to so instruct on the basis that no evidence of provocation had been shown. (T. 1286). Petitioner contends that the death penalty may not be constitutionally imposed when the trial court determines, as a matter of law, that the evidence of provocation is insufficient to warrant a jury charge on voluntary manslaughter.

In Georgia, the offense of voluntary manslaughter is defined as follows:

> A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person: however, if there should have been an interval between the provocation and the killing

> sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and punished as murder. Ga. Code Ann. § 26-1102 (emphasis added).

The Georgia Supreme Court has held that an instruction on voluntary manslaughter is warranted in cases which present any evidence, however slight, of the lesser offense. The determination of whether the "any evidence, however slight" standard has been met is not for the jury:

> It is a question of law for the courts to determine whether there is slight evidence that the defendant acted as a result of sudden, violent and irresistible passion resulting from serious provocation. Henderson v. State, 234 Ga. 827, 831, 218 S.E.2d 612 (1975).

A review of the record in the present case clearly indicates no evidence of serious provocation. Although Petitioner's testimony as to the events immediately preceding his brutal knife killing varied, none of the versions presented by Petitioner's confessions or trial testimony established any serious provocation.

Petitioner's first written and recorded statements describe a situation where Petitioner made an advance or tried to touch the victim and she reacted by hitting him on the chest. (T. 1140, 1162). The following afternoon, Petitioner made a second set of written and recorded

statements; Petitioner stated that while sitting on the couch smoking a "joint" he reached to touch the victim's shoulder, at which time she started hitting Petitioner "with the ball of her fists." (T. 1180, 1186-87).

Petitioner's trial testimony, which was considerably more detailed, revealed that the victim had resumed vacuuming when Petitioner:

> . . . grabbed her arm kind of to get her attention more than anything else, you know, hi, listen to what I got to say type of thing, and she turned around and when she turned just the look on her face was I don't know, almost like, what the hell are you doing here type thing, where did you come from? And it kinda threw me back for a minute and then she just kept staring at me, you know, all of a sudden I felt the big complex thing and I slapped her . . . with my hand . . . apparently it was pretty hard. (T. 1243-44).

On cross-examination, Petitioner stated that his prior statements were the truth only "to an extent." (T. 1282).

Petitioner's reliance on this Court's decision in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.E.2d 392 (1980) is misplaced. The Beck case is distinguishable from the case at bar in several fundamental aspects. First, the Beck case involved a challenge to an Alabama statute which had been construed as precluding instructions on lesser offenses in capital cases, 1/ as opposed to the present case where the

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1/ Alabama Code Section 13-11-2(a) (1975) provides: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be avered in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses." (emphasis added).

trial judge, having heard all of the evidence, made a legal determination as to whether there was any evidence of serious provocation. Second, the evidence in the Beck case would have supported a verdict on the lesser included offenses; the State conceded that under Alabama case law the defense would have been entitled to instructions on both felony murder and robbery absent the statute prohibiting such instructions. 447 U.S. at 630 n. 5. Finally, this Court explicitly approved the predominant state court rule that a defendant is entitled to a charge on lesser offenses only when warranted by the evidence. The teaching of the Beck decision is that a State can not arbitrarily preclude jury consideration of lesser offenses in death cases; there is no suggestion that such instruction should be given automatically or indiscriminately. 2/

Petitioner also seeks support from language in Gregg v. Georgia, 428 U.S. 153, 163, 96 S.Ct. 2909, 49 L.E.2d 859 (1976):

> If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948). See Linder v. State, 132 Ga. App. 624, 625, 208 S.E.2d 630, 631 (1974).

Petitioner seems to suggest that the instant case has been decided on principles different from those set forth in Linder v. State and Sims v. State, supra. The Linder decision set forth the "any evidence, however slight" rule but that case

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2/ See Jackson v. State, 337 So.2d 1242 (Miss. 1976).

involved undisputed serious provocation (dispute only as to quantum) and the Georgia Supreme Court held that the jury was to determine the amount of provocation and the interval between the provocation and the killing. 3/

Based on the foregoing, Petitioner's argument regarding the failure to charge the jury on voluntary manslaughter does not present an issue for review by this Court.

3/ The Sims decision involved rape and the lesser offense of assault with intent to rape or assault and battery; there is no discussion in that case of murder and voluntary manslaughter.

II. CONTRARY TO PETITIONER'S CONTENTION, THE TRIAL COURT AND THE GEORGIA SUPREME COURT PROPERLY DETERMINED THAT PETITIONER'S STATEMENTS WERE GIVEN IN COMPLIANCE WITH THE MIRANDA DECISION.

Petitioner contends that these four written and recorded statements to Georgia authorities were improperly admitted because Petitioner allegedly refused to waive his Miranda rights when initially taken into custody by New Orleans police.

Approximately ten days after the murder, Petitioner was arrested by New Orleans police who had been advised by the Georgia authorities to look for Petitioner in "flop houses" near the Greyhound Bus Terminal in New Orleans.

The evidence is contradictory as to whether Petitioner waived his right to remain silent or asserted his right to have an attorney present when conferring with New Orleans police. Petitioner claims that he indicated his desire for a lawyer (T. 210-11) and two arrest reports executed by the New Orleans police indicate a refusal to waive his rights (T. 265-66); however, both parties stipulated that if New Orleans Detective Norman Pierce was subpoenaed he would testify that he was the first person to talk with Petitioner in the New Orleans police station, that Petitioner was advised of his rights, waived those rights and never requested an attorney. (T. 226-27). Petitioner testified that he was never provided a lawyer in New Orleans (T. 211-12, 215); however, on cross-examination Petitioner did indicate that he was provided with the services of a public defender for his extradition hearing. (T. 220).

It is uncontradicted, however, that Detective Rowell of the DeKalb County (Georgia) Police Department was never advised by New Orleans police that Petitioner had either refused to waive his rights or asserted the right to counsel. (T. 202).

It is also uncontradicted that Detective Rowell fully advised Petitioner of his rights on at least four separate occasions. Initially, Detective Rowell advised Petitioner of his rights when he first met with Petitioner in New Orleans and Petitioner executed a written waiver. (T. 134, 1546). At that time, Detective Rowell questioned Petitioner briefly about a possible accomplice, Cody, but did not question Petitioner regarding his participation in the murder.

After Petitioner was returned to Georgia, Detective Rowell again advised him of his constitutional rights, Petitioner once again executed a written waiver and proceeded to give Detective Rowell a statement about the murder. (T. 138, 1547). A written statement made by Petitioner shortly thereafter also clearly indicates his intention to waive such rights (T. 142, 1139-42) as did his tape recorded statement on the same evening. (T. 147-178).

The following afternoon, after again advising Petitioner of his rights (T. 181), Detective Rowell sought to question Petitioner further about the details of the murder. Petitioner's written statement indicates that he had been advised of his rights. (T. 181). Petitioner also made a tape recorded statement that afternoon wherein he was fully advised of his rights again. (T. 185).

A review of this record indicates that Petitioner executed two written waivers and was advised of his rights on no less than four separate occasions by DeKalb County police.

The Georgia Supreme Court held that these facts were distinguishable from the circumstances of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.E.2d 378 (1981) because there was contradictory evidence as to whether Petitioner requested counsel in New Orleans and because Petitioner's statements were made after he had waived extradition, returned to Georgia and executed two written waivers. The Georgia Supreme Court further held:

> In our view it would be unreasonable to hold that an assertion of rights in the asylum state (assuming one occurred) operated to prevent any further inquiry by authorities in the requesting state as to whether the accused would like to speak to them, where the requesting authorities reasonably understood that no request for counsel had been made. 249 Ga. at 82.

In Edwards v. Arizona, supra, the suspect was advised of his rights, made an alibi statement and thereafter when discussing the possibility of a plea bargain stated: "I want an attorney before making a deal." 68 L.Ed.2d at 382. The next morning colleagues of the officer to whom Edwards indicated his desire for attorney, ignored Edwards' assertion that he did not want to talk to anyone, then proceeded to advise him of his rights and obtain an incriminating statement. This Court held:

> It is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. 68 L.Ed.2d at 387 (emphasis added).

As noted by the Georgia Supreme Court, the present case shows no clear assertion of the right to counsel as opposed to Edwards' straightforward request which apparently was tape recorded. In addition, the instant case does not involve "reinterrogation" by the same authorities; the New Orleans authorities held Petitioner on a fugitive warrant whereas the Georgia authorities questioned Petitioner regarding the crime when he was taken into their custody on the murder charge.

Based on the foregoing, it is apparent that Edwards v. Arizona, supra, is not controlling and that the dictates of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were fully complied with here. Accordingly, this argument presents nothing for the review of this Court.

III. CONTRARY TO APPELLANT'S CONTENTIONS THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SENTENCING PHASE REGARDING ITS AUTHORITY TO CONSIDER EVIDENCE IN AGGRAVATION.

Petitioner contends that the trial court's alleged failure to clearly instruct the jury could have resulted in the jury imposing the death sentence by utilizing Petitioner's prior armed robbery conviction or escape as a statutory aggravating circumstance.

An examination of the trial judge's instructions to the jury clearly reveals that the only statutory aggravating circumstance submitted to the jury was Ga. Code Ann. § 27-2534.1(b)(7):

> Now, in this case of the State v. Wayne Ladd Krier, the prosecution contends that the offense of murder, for which the defendant has now been convicted, was committed under the following statutory aggravating circumstances: (sic)
>
> The State contends that the offense of murder, as committed by the defendant, Wayne Ladd Krier, was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, Teresa Lavin.
>
> If in fact you find, beyond a reasonable doubt, that this statutory aggravating circumstance did in fact exist, then I

> charge you that such a circumstance is defined as a statutory aggravated circumstance under the law of this State and such a finding would authorize you, but not compel you, to recommend the death sentence. (T. 1489-90).

The judge further stated to the jury that, if the aggravating circumstance described was not proved beyond a reasonable doubt, they would not be authorized to recommend the death penalty. (T. 1493).

There is no suggestion in any part of the record of Petitioner's trial which would lead the jury to conclude that it could impose the death sentence on the basis of Petitioner's armed robbery conviction or escape.

The introduction of additional evidence at the sentencing phase, which does not support a statutory aggravating circumstance, is authorized by the Georgia statute, 4/ as held constitutional in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1978) and by the Georgia Supreme Court. In Green v. State, 246 Ga. 595, 272 S.E.2d 324 (1980),the Court rejected Appellant's argument that admission of evidence at the pre-sentencing hearing which does not support an aggravating circumstance is unconstitional:

> . . . it is also constitutionally required that a statute providing for the death penalty allow the sentencing body the

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4/ Ga. Code Ann. § 27-2534.1(b) provides that the judge "shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence . . ."

discretion to weigh all aspects of the defendant's character and record as well as the circumstances of the offense. See Lockett v. Ohio, supra; Fair v. State, 245 Ga. App. (sic) 868 (268 S.E.2d 316) (1980).

The instructions in this case clearly directed the jury's consideration to finding the subsection (b)(7) statutory aggravating circumstance as a pre-condition to any determination as to whether the death sentence could be imposed and then properly channeled their attention to all evidence presented at either phase of the trial which might be mitigating or aggravating.

Therefore, Petitioner's argument regarding the constitutionality of the sentencing procedure in the present case does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Wayne Ladd Krier.

Respectfully submitted,

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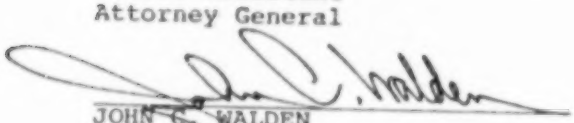

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